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IN THE

Supreme Court of the United States

October Term, 1964

No. 818

JACK H. SCOTT, EDITH L. SCOTT, and SUSAN L. SCOTT, by next friend, JACK H. SCOTT,
Petitioners,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December, 1964

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack H. Scott, Edith L. Scott, and Susan L. Scott, by next friend, Jack H. Scott, Petitioners, herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 12, 1964.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix

A hereto, infra; page 13. The judgment of the Circuit Court of Appeals is printed in Appendix A hereto, infra, page 16. The opinion of the United States District Court for the Middle District of Georgia, Columbus Division, is printed in the record at page 343, and the judgment of the United States District Court is printed at page 361.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on *November 12, 1964* (infra, appendix A, page 16). The jurisdiction of the Court is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED

Is an equestrian riding club located on the Fort Benning military reservation, which is established with the consent of the Post Commander and all of whose activities are subject to the control of the Commanding General of Fort Benning, a "federal agency" within the meaning of the Federal Tort Claims Act?

STATUTES INVOLVED

The Federal Tort Claims Act of 1946, 28 U.S.C. 1346(b) and 28 U.S.C. 2671.

1346, United States as defendant:
(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclu-

sive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2671, Definitions:
As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term — "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the Government" includes offices or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

STATEMENT

Basis of Jurisdiction in the District Court, Middle District, Georgia, Columbus Division.

Jurisdiction in the District Court was founded on the Federal Tort Claims Act, Section 1346(b) and Section 1402(b), Title 28, United States Code.

"Section 1402, United States as defendant:

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the Plaintiff resides or wherein the act or omission complained of occurred."

Facts

On May 17, 1961, Plaintiffs Edith and Susan Scott were injured when a hitching post negligently maintained by civilian employees at the Hunt Club, an equestrian riding club located on Fort Benning military reservation, fell on them. Captain Jack Scott, his wife Edith and daughter Susan brought suit against the United States under Section 1346(b) of he Federal Tort Claims Act. The United States defended in the district court on the grounds that the club was not a "federal agency" within the meaning of Section 2671 of the Federal Tort Claims Act. The United States defended in the district court on the grounds that the club was not a "federal agency" within the meaning of Section 2671 of the Federal Tort Claims Act. The District Court and the Court of Appeals held that the Hunt Club at Fort Benning was not a "federal agency".

Organization of the Club

The Hunt Club was organized in 1956 with the consent of the Commanding General, Fort Benning. Its Constitution stated that it was to be organized as a private association under the provisions of paragraph

2b of Army Regulations 230-5 with the approval of the Commanding General, Fort Benning, Georgia, and that the "Hunt shall not operate as an instrumentality of the Federal Government by individuals acting outside the scope of their official capacity as official employees or agents of the Government." (R. 55, Plaintiff's Exhibit 8, Article II.)

The property on which the club stands is property of the United States Army (R. 234). Several of the buildings on the club property were constructed by the Army and were turned over to the club at the time of its inception. (R. 234)

The Army Regulation under which the Hunt Club was organized, AR 230-5, specifies that organizations such as the Hunt Club shall not be instrumentalities of the United States government[1]. Another part of that

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[1] 2. Scope.

a. . . . .

b. Private associations and funds thereof, organized, established and operated by individuals acting not within the scope of their official capacity as officers, employees, or agents of the Government, and which are not established to provide essential morale and recreational facilities and services, are not subject to these and other departmental regulations governing nonappropriated funds as defined herein as instrumentalities of the Government. Such associations and funds thereof, except as otherwise provided by law or regulations, shall exist on a military installation only with the written consent of the installation commander. Such consent shall be contingent upon the following requirements and conditions as may be appropriate under the circumstance . . . (6) That such associations are self-sustaining and receive no support assistance, or facilities from the Army or from nonappropriated funds defined in these regulations, except as provided for in AR 210-55 and AR 420-80.

regulation specifies that nonappropriated activities, that is activities carried on on military installations which send their profits to central funds for the use of similar activities on other military installations, shall be instrumentalities of the United States government.[2]

The Stable Officer and the President of the club were directly in charge of the maintenance of the club and they had hired help to maintain the premises. (R. 104) However, Army Post Engineers had done maintenance work around the area. (R. 138, 150, 137, 250, 263, 149, 255) The Signal Corps had on occasion brought bleachers and lighting equipment to the club to be used in shows. (R. 296)

Formal connection with the Army includes these things: The club was organized with the consent of the Commanding General, Fort Benning, monthly financial reports were submitted to military headquarters as were minutes of the meetings of the Board of Governors for approval and auditing, and all of the club's activities were subject to the control of the Commanding General. (Plaintiff's Exhibit 8, Articles X, V, and IX-26, respectively.)

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[2] 3. Definitions. For the purpose of these and implementing regulations, the following definitions apply:

a. Nonappropriated fund. A nonappropriated fund prescribed by these regulations is an entity established by authority of the Secretary of the Army for the purpose of administering moneys not appropriated by the Congress for the benefit of military personnel or civilian employees of the Army and not incorporated under the laws of any State or the District of Columbia. Nonappropriated funds authorized by these regulations are instrumentalities of the United States.

REASONS FOR GRANTING THIS WRIT

This petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted for the following reasons:

I. The decision of the Court of Appeals in *Scott v. United States* (Appendix P. 13) is in conflict with the decisions of several federal courts on the question of the liability of the United States for torts committed on facilities established on United States military installations, and particularly in conflict with *Brown v. United States,* (S.D., W. Va., 1951, 99 F. Supp. 685) and *Brewer v. United States,* (M.D., Ga., 1952, 108 F. Supp. 889).

Petitioner finds no federal court decision dealing with recreational facilities located on military installations and established with the consent of military officials in which such facilities have been declared not to be federal agencies. In the following cases, the federal courts have decided that given facilities are federal agencies:

1. *Rizzuto v. United States,* 298 F. 2d 748 (1961, 10th Cir.). A bowling alley operated on a military installation for the benefit and pleasure of members of the armed forces and established under a Central Base Fund is a federal agency.

2. *United States v. Hainline,* 315 F. 2d 153 (1963, 10th Cir.). An aero-club established under an Air Force regulation which specifically desig-

nated such clubs as government instrumentalities is a federal agency.

3. *United States v. Holcombe,* 277 F. 2d 143 (1960, 4th Cir.). A Navy officer's mess, though a non-appropriated fund activity, is a federal agency.

4. *Grant v. United States,* 271 F. 2d 651 (1959, 2nd Cir.). A ship's service store operated as a non-appropriated fund activity is a federal agency.

5. *Robert L. Daniel v. Chanute Air Force Base Exchange,* (E.D. Ill., 1955, 127 F. Supp. 920). A post exchange operated on a military installation is a federal agency.

6. *Fournier v. United States,* (S.D. Miss., 1963, 220 F. Supp. 752). A club which sold drinks is a federal agency.

In *Brown v. United States,* (S.D. W. Va., 1951, 99 F. Supp. 685) the District Court held that a swimming pool maintained by the United States at a naval station for the benefit of servicemen and their families was a federal agency. The Hunt Club at Fort Benning was maintained officially by the United States for the benefit of servicemen and their families. (R. 138, 150, 137, 250, 263, 149, 255).

In *Brewer v. United States* (M.D. Ga., 1952, 108 F. Supp. 889), the District Court held that a civilian swimming pool located at Warner Robins Air Force Base, and constructed, maintained, and under the direct

supervision and control of military personnel was a federal agency. The Hunt Club was partially constructed by military personnel (R. 234) and was partially maintained by Army Post Engineers (R. 138, 150, 137, 250, 149, 255) and was ultimately under the control of the Commanding General (Article IX-26, Plaintiff's Exhibit 8.)

The decision of the Court of Appeals in the case of *Scott v. United States* (Appendix P. 13) is in conflict with the cited decisions in that it requires that the Plaintiff prove extensive connection between the military and the facility before a facility located on military installation property with their consent will be declared to be a federal agency.

II. The decision of the Court of Appeals for the Fifth Circuit in *Scott v. United States* (Appendix P. 13) is in conflict with the Tenth Circuit decision in *Hainline v. United States*, 315 F. 2d 153 (1963, 10th Cir.) on the question of the effect of military regulations on the liability of the United States under the Federal Tort Claims Act.

The *Hainline* court, *supra*, said that an Air Force regulation which stated that all members of aeroclubs established under the regulation were to be "employees" of the United States government:

> "does not purport to, nor could it, enlarge the liability of the United States under the Federal Tort Claims Act or create any new or different definition of the word "employee" as used in the Act . . . (the regulation) does not make them employees in determining the substantive lia-

> bility of the United States under the Act. The fact of employment must be determined under federal law . . . *United States v. Hainline*, 315 F. 2d 153, 156 (1963, 10th Cir.)"

The Fifth Circuit Court in the *Scott case* (Appendix P. 13) held that Army regulations could enlarge or limit the liability of the United States under the Federal Tort Claims Act and could create a new and different definition of "federal agency". The court held that since the Hunt Club was established under Army Regulation 230-5, which regulation made all organizations established under it not "instrumentalities of the United States Government", the Hunt Club was not a federal agency within the meaning of the Federal Tort Claims Act.

III. The decision of the Court of Appeals in *Scott v. United States* (Appendix P. 13) is in conflict with the decision of the Supreme Court of the United States in *Standard Oil Company of California v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 89 L. ed. 1611 (1942) on the question of the definition of federal agency.

The Supreme Court held in *Standard Oil Company of California v. Johnson, supra*, that post exchanges operated on military installations were an "arm of the federal government", and that consequently a state tax on gasoline which exempted sales to the "government of the United States or any department thereof" exempted all sales made to Post Exchanges established on the military installations.

> "From all this we conclude that post exchanges as now operated are arms of the government

> deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties intrusted to it. . . ."

Standard Oil Company of California v. Johnson, 316 U.S. 481, 485, 62 S. Ct. 1168, 89 L. Ed. 1611 (1942). Recreational riding clubs are "integral" to military operations, as are all athletic recreational facilities, and are just as "integral" to military operations as are post exchanges.

IV. The Court of Appeals in *Scott v. United States* (Appendix P. 13) decided an important and substantial question of federal law which should have only been decided by the Supreme Court of the United States.

The Supreme Court of the United States has always encouraged liberal construction of the Federal Tort Claims Act. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

The decision in *Scott v. United States* (Appendix P. 13) contravenes that policy of liberal construction by requiring the Plaintiff to show either integration with military operations or extensive supervision and control by the military before a recreational facility located on a military installation with the consent of the Commanding Officer there will be declared to be a federal agency within the meaning of the Federal Tort Claims Act.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENT AND KEARNS

L. B. Kent,
Counsel for Petitioner.

Counsel of Record
311 Columbus Bank and Trust Company
Columbus, Georgia

Date_____

CERTIFICATE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to opposing counsel of record this _____ day of December, 1964.

_____
L. B. Kent

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21341

JACK H. SCOTT, EDITH L. SCOTT and
SUSAN L. SCOTT, by next friend, JACK H. SCOTT,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(October 21, 1964.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

PER CURIAM: This suit was brought against the United States under the Federal Tort Claims Act, 28 USCA, §§ 2671-2680, to recover for injuries received by Edith and Susan Scott while on the premises of the Hunt Club located on the Fort Benning military reservation. Under the Tort Claims Act, the United States is liable for the negligence of the employees of any "federal agency." The District Court held that the Fort

Benning Hunt Club was not a federal agency, and that therefore the United States could not be sued for the negligence of its employees. The controlling question presented by this appeal is whether this holding was correct.

The Hunt Club is located on the Fort Benning reservation; and its membership consists primarily of military personnel and their dependents. It is a self-supporting organization receiving no appropriations from the United States Treasury. It maintains a small civilian staff paid entirely out of funds collected from the members. Permission to establish the club was granted by the Commanding General of Fort Benning, and he exercises ultimate authority over its activities. However, the normal activities of the club are overseen by a board of governors elected from its membership. The club's constitution provides that it is a "private association" which "shall not operate as an instrumentality of the Federal Government," and that it was established under Army Regulation 230-5, ¶ 2b. This regulation permits military personnel acting in their unofficial capacities to form "private associations . . . which are not established to provide essential morale and recreational facilities," and exempts these associations from regulations applicable to "instrumentalities of the Government."

We feel that the district judge adequately canvassed the law in this area and correctly concluded that there was insufficient nexus between the Hunt Club and Fort Benning to classify the club as a federal agency under the Tort Claims Act. See *Scott v. United States,* M.D.Ga., 1963, 226 F.Supp. 865. All of the decisions relied on by appellants involve activities which were

essential or integral to military operations, e. g., *United States v. Holcombe,* 4 Cir., 1960, 277 F. 2d 143 (Naval officer's mess held to be a federal agency), or which were subject to greater supervision and control by military authorities, *United States v. Hainline,* 10 Cir., 1963, 315 F. 2d 153 (flying club held a federal agency); *Brewer v. United States,* M.D.Ga., 1952, 108 F. Supp. 889 (swimming pool). In *Rizzuto v. United States,* 10 Cir., 1961, 298 F. 2d 748, apparently holding that a bowling alley is a federal instrumentality for the purposes of 5 U.S.C. § 150k-1, the degree of governmental supervision and control of the bowling alley is not revealed by the decision and record in that case, but we note from the record that, unlike the Army Regulation here involved, the Air Force regulation authorizing the bowling alley provided that activities established thereunder were instrumentalities of the United States Government.

The judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21341

D. C. Docket No. 951 — C. A.

JACK H. SCOTT, EDITH L. SCOTT and
SUSAN L. SCOTT, by next friend, JACK H. SCOTT,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 21, 1964

Issued as Mandate: Nov. 12, 1964